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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 955

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Brief for the respondent in opposition.

OPINIONS BELOW

The findings of fact, the opinion, conclusions of law and the judgment of the District Court denying the petition for injunction and dismissing the case appear in the record from pages 94 to 97.

The opinion of the Circuit Court of Appeals for the Fifth Circuit affirming the District Court appears in

the record from pages 125 to 127. The opinion is reported at 145 F. (2), 349.

JURISDICTION

The Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

QUESTION PRESENTED

Petitioner sought to enjoin the respondent from violation of the Fair Labor Standards Acts. The issue was whether under the facts the respondent had intentionally violated the law and intended to continue violation.

The District Court found that the defendant "did not intentionally violate the law" and had "ceased such practices and has manifested a desire and willingness to fully conform to the provisions of the law"; and on the basis of the principle that "the purpose of an injunction is not to punish a defendant for past acts but to deter a defendant from future unlawful acts" the Court concluded that there was "no necessity for an injunction." (Quotations are from the finding of facts, opinion and conclusions of law).

The Circuit Court of Appeals was of the opinion that ". . . a new contract had been entered into . . . which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked, and the defendant had ceased to employ stackers on the basis complained of" and that ". . . it was manifest that the defendant had no intention of returning to the method of payment in dispute" and agreed with the trial court that there was no necessity for an injunction to prohibit future violations.

The only question that could here be raised would be whether under the facts the trial court abused its discretion in denying the injunction.

The answer to the question involves only the application of *Hecht Company vs. Bowles*, 88 L. ed. 465, and *Fleming vs. Pelo*, 316 U. S. 624.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A., Sec. 201), Section 7a of which provides for overtime, and Section 15 of which gives the district court jurisdiction for cause shown to restrain violation. This statute will hereafter be referred to as the Act.

STATEMENT

The complaint charged several violations of the Act. All charges were abandoned except the alleged violation of the overtime provisions of the Act.

The respondent operated a saw mill at Samson, Alabama. All employees except the lumber stackers were paid on an hourly basis and were fully paid for all time and overtime. The staskers were paid on a piece rate basis.

Lumber stacking is common labor. It consists of the simple unskilled work of picking up boards and placing them in a stack. The custom in the lumber industry has always been to pay the stackers on a piece rate basis. Although the stackers are common laborers, nevertheless they make nearly double the wages of other common laborers working on an hourly basis. They work for the most part independently of the other operations of the mill. The system is described by Youngerman, president of the defendent company, at

page 78 of the record. The lumber goes through the mill and then to the green chain where hourly paid men take the lumber off, sort it and put it on various wagons of lumber dollies which are then moved away by hourly paid men to a place where the stacking is to be done. At that point hourly paid employees remove the lumber from the dollies and leave the lumber in separate piles. At this point the work of the hourly paid employees ceases and from that point on the stackers take over. They work on a piece rate basis.

The stackers go to work when they choose, work as long as they want to, and stop when they get ready. Some of them come early in the morning before the mill has started and work in the cool of the morning. Later in the day when it gets hot they will quit and then come back later on in the cooler afternoon hours and do some more stacking. They quit work when it rains and virtually work when and as they please. Although they are common laborers the nature of their work is such that they work practically without supervision and at such hours as they see fit. It is almost universal in the trade for this kind of common labor to work on a piece rate basis at an agreed price for the amount of lumber stacked. (R. pages 77, 78, 79).

Prior to the Act respondent had employed the stackers on a piece rate basis of an agreed amount per thousand board feet of lumber stacked. At one time the company put the stackers on an hourly pay basis. They threatened to quit and it was necessary to put them back on a piece rate basis. (R. 95).

Petitioner had sent inspectors to the defendant's mill for an inspection some time in 1940. (R. 72). At that time the question of the stackers came up and the inspectors told respondent's president, Youngerman, that his piece rate pay system was all right. Later, a

second inspection was made in 1941 and again the inspectors told Youngerman that his piece rate basis was satisfactory.

There was a third inspection in the fall of 1942. It was then for the first time that Youngerman was told that his piece rate basis of paying the stackers without extra pay for overtime hours was a violation of the law. (R. 95). The defendant soon afterwards ceased to work the stackers any overtime hours[1]. After the suit was filed the amounts paid thereafter to the stackers was as an advance on their wages and the final payroll record was held in suspense until the company could find out what its duty was and this admittedly was done in good faith[2].

The day before the trial new contracts were drawn up with the stackers modeled after the contract involved in the *Belo* case. These contracts were read to the employees, were signed by them and by the company, and a copy was given to them and they are valid employment contracts unless made invalid by the act involved in this case. They were not "elaborate" as described in the petition but were simple employment contracts. (See Appendix).

The trial court found the following facts with reference to the amount of overtime worked: (R. 95).

1940. "During most of the year 1940 the stackers were taken off of the per thousand basis and were put

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[1] The statement in the petition here at page 4 that "Respondent . . . continued to employ the stackers during overtime hours . . . without compensating them at one and one-half times the regular rate of pay" is in conflict with the trial court's finding of fact, paragraph 6, (R. 95). The tabulation of wages paid (R. 115) shows an abrupt end of overtime weeks during the early part of September in the fall of 1942 and no further overtime (with two possible isolated exceptions) during the balance of 1942 and the spring of 1943 until the date of the suit on March 17, 1943.

[2] It is admitted in petitioner's brief (p. 3) on the original submission in the Circuit Court of Appeals that "These steps were taken in good faith and on advice of counsel."

on an hourly basis and were paid time and a half for all overtime worked."

1941. "During 1941 from January to May, the stackers were not worked any overtime and from May to the end of the year there was very little, if any, overtime worked."

1942. "During 1942, out of approximately 234 man weeks of work approximately 87 man weeks were overtime . . . During the fall of 1942 one of the plaintiff's inspectors notified the defendant that it was a violation of the law to work the stackers on a piece rate basis without paying time and a half for overtime . . . The defendant soon afterwards ceased to work the stackers any overtime . . ."

1943. ". . . from January 1, 1943, until the time of the filing of the suit, no overtime was worked." "After the suit was filed there was some overtime worked and the defendant continued to pay the amount which would be due on the piece rate basis but held its books in suspense so that the amount paid would be considered as an advance and if it should owe any additional amount of overtime it could be paid."

Thus during the years 1940, 1941, 1942 and 1943 to the date the action was filed the trial court found that there was no substantial amount of overtime worked except during the early part of 1942 when about one-third of the man weeks were overtime but when the inspector notified the defendant that its system of pay was not in compliance the defendant ceased to allow the stackers to work any overtime.

When the suit in this case was filed in the early part of 1943 it became apparent that the petitioner was attacking the piece rate system of pay. *United States vs. Rosencasser* had not at that time been decided and as stated in paragraph 8 of the finding of facts, "The

language of the statute applicable to overtime is not sufficiently explicit to make it clear to a layman that it is a violation of the law to work a stacker on a piece rate basis without additional compensation for overtime." Petitioner was charging that piece rate pay was a violation but the stackers were not willing to work on an hourly basis. Eventually, therefore, a pay system was adopted which would provide for overtime compensation so as to meet the contention of petitioner and at the same time permit the stackers to receive as incentive pay an additional amount based on the amount of lumber stacked. This system was developed and was put into effect the day before the trial. The new pay system was adapted from the principle of the *Belo* case[3].

The petition here sets out only a part of the employment contract. The entire contract is for convenience shown in the Appendix.

It should be kept in mind that no question of straight time pay was involved in the case and that the only question was with reference to weeks where the stackers work more than 40 hours, and that the employment contracts were entered into the day before the trial and consequently there had been no work, overtime or otherwise, under these contracts.

It was not the duty of the district court to assume that at some future time the stackers would work overtime so as to raise the question as to the validity of the contracts.

The contracts served to show that the defendant had abandoned the practice complained of. Whether the company would or would not in the future allow the stackers to work overtime hours was a matter which could not be known ahead of time. Overtime weeks

[3] *Fleming vs. Belo Corp.*, 316 U. S. 624.

had been relatively few. There had been periods when there had been no overtime weeks at all, as, for instance, all of 1941, part of 1942, and the spring of 1943. It would not be permissible to go outside of the record and here state that there has been no overtime worked since the trial of this case but it would be proper to say that it would be fair to assume that the defendant having tasted the bitter experience of being brought into expensive litigation because of a small amount of overtime work might well have decided that it would not permit any future overtime work at all. The validity of the agreements would come into question only if overtime was worked.

Thus it was that the trial court merely held that the defendant "had ceased to employ its stackers on the basis complained of," the straight piece rate basis. Neither it nor the Circuit Court of Appeals undertook to pass upon the question whether if overtime should be worked the provisions of the contracts would satisfy the overtime requirements of the Act.

REASONS FOR NOT GRANTING THE WRIT

The sole question for decision in the trial court was whether an injunction was necessary to prevent violation. The sole question for decision in the Circuit Court of Appeals was whether under the facts found by the District Court[1] it had abused its discretion in denying the injunction.

Section 17 of the Fair Labor Standards Act provides: "The District Court . . . shall have jurisdiction *for cause shown* to restrain violations . . ." (Emphasis supplied).

[1] Rule 52 provides in part: "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

It is clear that except where a statute gives an absolute right, the granting or refusal of an injunction rests in the sound discretion of the court.[1]

The power of courts to issue an injunction should be exercised sparingly and with great caution.[2]

The Emergency Price Control Act of 1942 (Section 205a) provides that the administrator under that statute may make application for an order enjoining violation and "upon a showing . . . a permanent or temporary injunction . . . shall be granted."

In *Hecht Company vs. Bowles*, 88 L. ed. 463, decided February 28, 1944, the administrator applied for an injunction under the act just mentioned and was able to prove certain violations. The district court found that the violations were made without "intent to violate the regulations" and that the issuance of an injunction would have "no effect by way of insuring better compliance in the future." This Court sustained the discretion of the district court and wrote as follows:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' Meredith v. Winter Haven, 320 U. S. 228, 235, ante, 1, 4; 64 S. Ct. 7. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each degree to the neces-

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[1] *Petroleum Exploration vs. Public Service Com.*, 304 U. S. 209, at 218. *Harrisonville vs. Dickey*, 289 U. S. 334 at 337, 338.

[2] "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction." *Truly vs. Wanzer, et al.*, 5 How. 142

sities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjudgment and reconciliation between the public interest and private needs as well as between competing private claims."

In the case at bar the district court in its opinion wrote: (R. 97).

> "The individuals operating the defendant corporation in this case are laymen and are not skilled in interpreting and construing new laws. They no doubt reached the conclusion that under their arrangement with the lumber stackers they were paid wages which amounted to as much or more than the minimum wage prescribed in the act with time and a half paid for all overtime and that as this arrangement was satisfactory to both the employer and the employee that they were acting within the spirit and intention of the law that they were not required to pay any additional amount. In this conclusion, if the construction placed on the act by the administrator and some of the courts is right, the defendant was wrong. But in the opinion of this court it was not such wrong and there was not such intentional violation of the law resulting therefrom as to call for injunctive relief especially where there is evidence, as there is in this case, that the defendant has ceased such practices and has manifested a desire and willingness to fully conform to the provisions of the law."

There are other cases where such discretion has been exercised and injunction has been refused where the

violations had ceased or there was no reason to apprehend future violations.

At the time of the decision of the district court (October 25, 1943) the case of *United States vs. Rosenwasser*, 89 L. ed. 249, (January 2, 1945) holding that piece workers are within the overtime provisions of the Act, had not been decided but the trial court here assumed without deciding that such was the law but found that the failure to comply had not been an intentional violation but a lack of understanding. That the proper construction of the overtime provisions of the Act was not without difficulty is indicated by the fact that the decision of this court in the *Rosenwasser* case was not unanimous.

The trial court found that the defendant had "manifested a desire and willingness to fully conform to the provisions of the law." There was therefore not necessary to compel the defendant to do what it was manifestly willing to do.

The trial court was not willing to declare that unintentional noncompliance by the defendant company made it necessary to place upon it the stigma of being a law violator. In reaching its conclusion that court had the opportunity of seeing the witnesses, of observing their demeanor, of judging their credibility and of deciding whether an injunction was necessary.

Fleming v. Hoerman, d. b. a. Lyndon Broom Co., (DC Kan.; 1942) 6 Labor Cases Sec. 61283.

Fleming v. National Bank of Commerce of Charleston, (DC, W. Va.; 1941) 41 Fed. Supp. 833.

Walling v. T. Buettner and Co.; (CCA-7; 1943) 6 Labor Cases Sec. 61,445, February 11, 1943.

Walling v. John J. Casale, Inc., (DC N. Y.; 1943) 6 Labor Cases Sec. 61,524, March 26, 1943.

Fleming v. W. E. Lipshutz, d. b. a. Monarch Co.; (DC Ga.; 1943). 6 Labor Cases Sec. 61,490, February 12, 1943.

Walling v. Emery Wholesale Corp., (DC, Ga.; 1943) Affirmed 138 F (2) S 48.

Walling v. W. B. Pine, (DC, Okla.; 1942) 6 Labor Cases Sec. 61,189, June 24, 1942.

Fleming v. Phipps, 35 F. Supp. 627.

The petitioner here does not seem to question the proper exercise of the trial court's discretion in denying the injunction but seeks to raise a hypothetical issue as to whether if the employer should allow the stackers to work overtime hours it could properly pay them in accordance with the contract. The "question presented" is stated to be

> "Whether an employee . . . is excused from payment . . . for overtime . . . by a contract . . . etc."

This question would not arise until overtime had been worked. That it is a hypothetical question is indicated by the fact that neither of the courts below decided it.

But if the question is to be taken up for decision by this Court the answer depends upon whether or not the principle of the *Belo* case is to stand.

The principle of the contract in each case is the same. In *Belo* it was a contract to pay a stipulated rate per hour for straight time, one and a half times that for overtime, with a guaranty of a sum not less than a stipulated total. Here, it was a contract to pay a stipulated rate per hour for straight time, one and a half times that for overtime, with a guaranty of a sum not less than a stipulated total arrived at by the simple arithmetic of multiplying the amount of lumber stacked by an agreed amount per thousand board feet.

The purpose of the contract in the *Belo* case was to provide the employees with a minimum amount based on an agreed hourly rate and to enable them to have at least a definite minimum total pay each week. The similar purpose here was also to provide the employees with a minimum amount based on an agreed hourly rate and to enable them to increase that amount by

receiving additional pay based on the amount of their effort.

The controversy here, as in the *Belo* case, centers about the question whether the "regular rate" should be computed from the guaranteed or total weekly wage or whether it should be identical with the hourly rate set forth in the employment contract. The point has been decided adversely to petitioner in the *Belo* case. It is doubtless again raised now with the hope that a change in the personnel of the Court might mean a change in the principles announced by the Court. But this should not be if ours is to continue to have some semblance of being a government of laws rather than of men.

It is charged in the petition that the contracts did not alter the character of the piece rate basis but were intended to preserve it. The employer here was on the piece rate basis before the Act. If it be contended that the contracts are bad because they permit the same total weekly wage as before the Act, the answer is to be found in the statement in the *Belo* case:

> "It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act."

The arguments advanced by petitioner here are almost identical to those in the *Belo* case which actually boil down to the contention that parties cannot by contract agree upon what is to be the regular hourly rate. But in the *Belo* case the court wrote:

"But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract."

The contracts here provide that the workers shall be paid for their *time*, those *hours* worked, on the basis promulgated as a minimum by petitioner for the lumber industry with time and a half for any overtime *hours* they might work. They would get this hourly rate regardless of how *slow* they might work. The Act, which appears to be applicable mainly to the *time* element, is therefore satisfied. In addition to pay for their *time* the employees get paid for their *effort*. This amount is measured by the amount of lumber stacked.

The contracts here while complying with the spirit as well as the letter of the law in providing for pay for the workers' *time*, go further and provide a reward for *effort* by stipulating for a total pay of not less than a sum based on the amount of lumber stacked. But in no event, no matter how little the effort, or how little lumber they might stack, the employees are nevertheless to be paid for their *hours* including overtime hours.

Here, as in the *Belo* case, was an example of a "special problem" because just as the employees there wanted a regular weekly income, the employees here wanted a system under which by increased effort, even during the straight overtime hours, they could make more money. They were actually not willing to work on any other basis.

Here a contract had been signed by the employer as in the *Belo* case and in adition the employees, too, had signed. They had agreed in writing what was really understood all along and that was that they were

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So found by the trial court, see paragraph 6, R. p. 95.

to get at least the minimum under the Act for their hours and more for their effort. What was said about employment contracts in the *Belo* case applies also in principle here:

> "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours."
>
> "This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day."

It would be necessary for the Court to overrule the *Belo* case in order to hold the contracts here invalid. But the rule of *stare decisis* would suggest that the established law be left settled in order that parties may know what the law is and govern themselves accordingly.

Walling vs. Helmerich & Payne, Inc., 89 L. ed. 1, is cited by petitioner as controlling here. To be controlling it should be similar either in its facts or its principle. It is neither. There the employer was paying $87.00 for an eight hour shift or tour (or 87½c per hour) prior to the Act. After the Act and under a new contract the pay was to be 70c for the first four hours of each eight hour shift or tour as the "regular rate" and one and one half times that amount or $1.05 per hour for the other four hours, characterized as "overtime." Thus each eight hour shift would involve both "regular pay" and "overtime pay." No room for application was given to the provision of the Act for

overtime pay after forty hours. This is called the "split day" plan.

Here there was a completely orthodox agreement for straight time hourly pay and overtime hourly pay plus an agreement to reward incentive by paying for results produced.

In one, a disregard of overtime hours, in the other an express provision for payment for overtime hours.

The case cited is not analagous for the further reason that it involves no guaranty as in the case at bar. The case cited does not overrule the *Belo* case on which the contracts are based but distinguishes it by showing that the *Belo* case involved a different question (headnote 6) namely, whether the regular rate should be computed from the guaranteed weekly wage or whether it should be the regular rate agreed on in the contract.

Furthermore, the split day plan is condemned by the court as involving "ingenious mathematical minipulations" and as being "unrealistic and artificial" and as "fictitious." On the contrary in the case at bar counsel for appellant in the brief on original submission in the Circuit Court of Appeals (p. 18) have admitted that the contracts in the case at bar were "made in good faith."

The *Helmerich* case is not similar in its facts or its principle and is in no way controlling here. The fact that this Court distinguished the case on its facts from the *Belo* case in a sense reaffirmed its principle.

It is difficult to see the basis in the record for the charge (p. 6) that the Circuit Court of Appeals "permitted a clear evasion of the Act to stand" or the charge (p. 7) "the purpose and effect of respondent's contracts were to circumvent the overtime provision of the Act," or that the rate fixed by the contract was "artificial, fictitious" in the face of the fact that these were common

unskilled laborers whose rate, as the minimum, had been fixed by petitioner's own promulgation, or in the face of the conclusion by the trial court (R. 97) that "there was no intention to disregard or evade the law." Nor is it easy to see the consistency of the implication of bad faith in the present petition with the admissions of good faith on respondent's part contained in the brief for petitioner in the court below (p. 3, p. 18).

CONCLUSION

Briefly stated respondent's position is that the only question for decision in the trial court was whether it was necessary to enjoin respondent from future violation of the Act. The trial court in the exercise of its discretion (Hecht case) denied the injunction and no claim is made here that in so doing it abused its discretion. Its conclusion could be justified equally well either on the ground that the piece rate pay system complained of had been abandoned or that there had been so comparatively few overtime weeks in the past that there was little likelihood of any in the future.

The validity of the employment contracts entered into before the trial comes into question only if overtime hours should thereafter be worked but with no justification of the court assuming that there would be any overtime work.

If the validity of the employment contracts is to be considered they are governed by the *Belo* case and not by the *Helmerich* case.

For the foregoing reasons the writ should be denied.

FRED S. BALL, JR.,
Attorney for Respondent.

March 1945.

APPENDIX
COPY OF EMPLOYMENT CONTRACT

Whereas, the undersigned employee of Youngerman-Reynolds Hardwood Company, hereinafter called the company, has been working as a stacker for the company for some time and the work was done on a piece-work basis of the fact that said employee was not willing to work on an hourly basis; and

Whereas, the piece-work basis was understood both by the employee and the company to include additional compensation for any overtime hours worked; and the employee has been fully paid all amounts due him up to the last pay day and the parties desire to put in writing the agreement which has at all times been understood between them;

Now, therefore, it is agreed between the company and the employee that the agreement as to the basis of pay is as follows:

The basic or regular rate of pay is 35c per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:

The amount of stacking done by said employee shall be figured on the basis of 80c per thousand board feet of lumber for flat stacking and 70c per thousand board feet for lumber racked.

In witness whereof, the parties have entered into this agreement in this 21 day of September 1943.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY,
By G. C. Youngerman, Employer,
As its President.

JOHN (his X Mark) TAYLOR, *Employee.*

Witness:
J. B. LOGAN
J. L. WILLETTE